No. 42811-3-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

THE BERT KUTY REVOCABLE LIVING TRUST,
by its TRUSTEE DAVID NAKANO,

Appellant/Plaintiff,

v.

GERRY and JOHN DOE MULLEN, et al,

Respondents/Defendants.

RESPONDENT'S BRIEF

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I. RESTATEMENT OF THE ISSUES

1. Did the trial court err by granting Columbia River Properties' (CRP) motion for summary judgment as to successor liability when (1) CRP and D.C., Inc. do not share common shareholders, officers, and directors; (2) CRP paid adequate consideration for the sole asset (a $50 set of file cabinets) it purchased from D.C., Inc.; and (3) CRP did not acquire substantially all of D.C., Inc.'s assets. **No.**

II. RESTATEMENT OF THE CASE

Fry established D.C., Inc. as a real estate brokerage in 1998. 3 Clerk's Papers (CP) at 389. On December 31, 2004, Fry sold all his shares in D.C. Inc. to Michael and Gerry Mullen, severed ties with the company, and moved to California. 2 CP at 365; 3 CP at 391, 394, 397, 400. Plaintiff originally filed this complaint on July 2, 2008. 1 CP at 1. At that time, defendant CRP did not exist, Fry was still living in California, and the sole shareholders, officers, and directors of D.C., Inc. were Michael and Gerry Mullen. *See* 3 CP at 374, 396-97, 399, 400. All acts and omissions alleged to have occurred in the complaint had obviously occurred before that date. In early 2009 Fry returned to Washington State and was hired by D.C., Inc. to run its real property management operation. 2 CP at 365; 3 CP at 399-401. Fry was an at-will employee and never re-acquired any ownership interest in D.C., Inc. 2 CP at 365; 3 CP at 401. At no time since he sold his shares in D.C., Inc. on December 31, 2004 has Fry been the designated broker of D.C., Inc. 2 CP at 365; 3 CP at 403.

Not long after D.C., Inc. hired Fry, Fry realized that his employer was losing substantial business and that his continuing employment was at risk. 2 CP at 365; 3 CP at 404. In anticipation of opening his own real estate brokerage, Fry incorporated CRP on May 27, 2009. 2 CP at 365-66; 3 CP at 404, 374. While D.C., Inc. was winding down its business, Fry left its employment. *See* 3 CP at 404-05. CRP opened its doors in early August 2009 from a different physical address than from which D.C., Inc. operated. 2 CP at 366. Fry never operated CRP at D.C., Inc.'s physical address. 2 CP at 366; 3 CP at 407. Since the time he was employed by D.C., Inc. in 2009, Fry was never its shareholder or director, received none of its profits and did not guarantee or accept personal liability for any of its debts. 2 CP at 366. Since forming CRP, Fry has been its sole shareholder and has been entitled to receive all profits generated by the corporation. 2 CP at 364, 366.

Real estate agents are employed by CRP as independent contractors. 2 CP at 366. Since the formation of CRP, some of the real estate agents it has employed as independent contractors, including Gerry Mullen, were agents previously employed by D.C., Inc. 2 CP at 366; 3 CP at 408-09. Others were not. 2 CP at 366. Fry has been the sole designated broker of CRP. 2 CP at 365.

CRP obtained property management contracts for some but not all properties which were formerly managed by D.C., Inc. 2 CP at 366; 3 CP at 410-11. Pursuant to state regulations, each property owner consented to CRP undertaking property management duties and designated CRP as the

licensed broker which would handle its rental trust account. 2 CP at 366. Fry personally solicited new management contracts between CRP and various property owners. 2 CP at 366; 3 CP at 419-20. CRP did not obtain the furniture, fixtures, or equipment of D.C., Inc., nor did it assume D.C., Inc.'s lease. 2 CP at 365, 367; 3 CP at 411. It did purchase two file cabinets from D.C., Inc. for $50.00 each. 2 CP at 367; 3 CP at 411.

No person other than Fry has ever been an officer, director or shareholder of CRP and D.C., Inc. transferred no assets to CRP which would have been available to satisfy D.C., Inc.'s obligations. 2 CP at 367; 3 CP at 424. Not only do the undisputed facts fail to support a claim that CRP is a successor to D.C., Inc., the Second Amended Complaint does not even allege facts which would, if true, constitute a basis for finding CRP liable as a successor. *See* 2 CP at 345-53.

The Appellant alleged that when it sold real property located at 174 Kuty Drive, Toledo, Washington to Defendants Lemp and New Enterprise, LLC, Defendants Gerry Mullen and D.C., Inc. d/b/a Northwest Properties of S.W. Washington acted as the Plaintiff's real estate agent and broker for the sale. 1 CP at 3-4. The Plaintiff further alleges that it was misinformed concerning the risks of secondary financing that it accepted for a portion of the purchase price. 1 CP at 4. Plaintiff claims this was due to the breach of duties by Defendants Mullen and D.C., Inc. d/b/a Northwest Properties of S.W. Washington. 1 CP at 4-5. Appellant obtained judgment against D.C., Inc. 5 CP at 767-68. Unable to collect

against D.C., Inc., Appellant then attempted to hold CRP liable for another entity's obligations.

The very cursory allegations regarding Defendant CRP contained in the Second Amended Complaint are limited to the following:

> "1.4 Columbia River Properties, Inc. is a successor company to D.C., Inc. d/b/a Northwest Properties of S.W. Washington, and is a Washington company doing business as a real estate brokerage in Lewis County, Washington";
>
> ....
>
> "3.5 In the event that Plaintiff obtains a judgment against D.C., Inc. that D.C., Inc. is unable to pay, Plaintiff is entitled to recover from Columbia River Properties, Inc. D.C. Inc.'s successor company."

2 CP at 346, 349. There are no allegations that CRP or Fry, its owner, in any way participated in the transactions which are the subject of the complaint. Likewise, there are no allegations that acts or omissions occurred which give rise to Plaintiff's conclusion that CRP is a successor to D.C., Inc.

Based on the total lack of evidence supporting the Appellant's claims, CRP moved for summary judgment as to successor liability (the only claim Appellant raised against CRP). 2 CP at 357-363. The trial court granted CRP's motion for summary judgment as to successor liability. 4 CP at 625-27. This appeal followed.

III. SUMMARY OF ARGUMENT

Respondent CRP is not a successor of D.C., Inc. CRP and D.C., Inc. do not have common shareholders, directors, and officers. CRP did not buy any assets from D.C., Inc. with the exception of a $100 set of file cabinets. CRP paid adequate consideration for the one asset that it took from D.C., Inc. and there is no evidence to the contrary. Quite simply, nothing CRP did frustrated D.C., Inc.'s creditors. Moreover, CRP did not take substantially all of D.C., Inc.'s assets. As such, the trial court did not err in granting CRP's motion for summary judgment.

IV. ARGUMENT

A. Review of the Summary Judgment Standard.

When reviewing an order granting summary judgment, this court engages in the same inquiry as the trial court. *Kahn v. Salerno,* 90 Wn. App. 110, 117, 951 P.2d 321, *review denied,* 136 Wn.2d 1016 (1998). Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. CR 56(c); *Wilson v. Steinbach,* 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). A material fact is one on which the outcome of the litigation depends, in whole or in part. *Morris v. McNicol,* 83 Wn.2d 491, 494, 519 P.2d 7 (1974). When a motion for summary judgment is before the trial court, it may decide questions of fact as a matter of law when reasonable minds

could reach but one conclusion. *Ruff v. Cnty. of King*, 125 Wn.2d 697, 703-704, 887 P.2d 886 (1995).

If the moving party is a defendant and meets this initial showing, the inquiry shifts to the plaintiff. *Young v. Key Pharms., Inc.,* 112 Wn.2d 216, 225, 770 P.2d 182 (1989). To meet this burden, the party opposing a motion for summary judgment must present facts that would be admissible in evidence at trial, and not ultimate facts or conclusions. *Layne v. Hyde*, 54 Wn. App. 125, 130, 773 P.2d 83 (1989). If, at this point, the plaintiff fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which the party will bear the burden of proof at trial, then the trial court should grant the defendant's summary judgment motion. *Young,* 112 Wn.2d at 225. This court considers all reasonable inferences in the light most favorable to the nonmoving party. *Clements v. Travelers Indem. Co.,* 121 Wn.2d 243, 249, 850 P.2d 1298 (1993).

An issue of credibility, which is incapable of being resolved at a summary judgment hearing, is present only if the party opposing the summary judgment motion comes forward with evidence which contradicts or impeaches the moving party's evidence on a material issue. *Howell v. Spokane & Inland Empire Blood Bank*, 117 Wn.2d 619, 818 P.2d 1056 (1991). Speculation and argumentative assertions that unresolved factual issues remain are not sufficient to defeat summary judgment. *City of Redmond v. Hartford Acc. & Indem. Ins. Co.*, 88 Wn. App. 1, 943 P.2d 665 (1997).

Here, Appellants attempted to survive summary judgment through mischaracterizations and argumentative assertions. This court should reject such attempts.

B. Columbia River Properties is Not a Successor to D.C., Inc.

CRP is not a successor to D.C., Inc. because it is not a mere continuation of D.C., Inc.; CRP and D.C., Inc. do not share common officers, directors, and shareholders; CRP paid adequate consideration for all assets taken from D.C., Inc.; and CRP did not take substantially all of D.C., Inc.'s assets. This court should reject Appellant's argumentative assertions to the contrary.

(1) Successor Liability.

The general rule is that there is no corporate successor liability. *Payne v. Saberhagen Holdings, Inc.*, 147 Wn. App. 17, 25, 190 P.3d 102 (2008). Thus, when a company sells its assets to another company, the purchaser is not liable for the debts and liabilities of the selling company, including those arising out of the seller's tortious conduct. *Hall v. Armstrong Corp, Inc.*, 103 Wn.2d 258, 261-62, 692 P.2d 787 (1984); *Payne*, 147 Wn. App. at 25. This general rule of non-liability is based on the premise that a sale of corporate assets transfers an interest separable

from the corporate entity and does not result in a transfer of unbargained for liabilities from the seller to the purchaser.

But, in four rare instances, successor liability may be imposed when (1) the purchaser expressly or impliedly agrees to assume liability; (2) the purchase is a de facto merger or consolidation; (3) the purchaser is a mere continuation of the seller; or (4) the transfer of assets is for the fraudulent purpose of escaping liability. *Hall*, 103 Wn.2d at 262. Courts developed the four exceptions to the general rule to protect the rights of commercial creditors and dissenting shareholders following corporate acquisitions. *Hall*, 103 Wn.2d at 262.

There is no evidence of an agreement by CRP to assume any liability of D.C., Inc. The purchase was not a de facto merger or consolidation and there is no allegation that there was a transfer of assets for a fraudulent purpose. Plaintiff argues that CRP is a mere continuation of D.C., Inc. Br. of Appellant at 44.

(2) Columbia River Properties is not a "mere continuation" of D.C., Inc.

To prevail on a theory of "mere continuation" there must be proof of three elements. The first element is a "common identity of the officers, directors, and stockholders in the selling and purchasing companies." *Gall Landau Young Constr. Co., Inc. v. Hedreen*, 63 Wn. App. 91, 816 P.2d

762 (1991) (citing *Cashar v. Redford*, 28 Wn. App. 394, 397, 624 P.2d 194 (1981)), *review denied*, 118 Wn.2d 1022 (1992). The second element is "the sufficiency of the consideration running to the seller corporation in light of the assets being sold." *Gall Landau Young Const.*, 63 Wn. App. at 97; *Cashar*, 28 Wn. App. at 397. The third element is a requirement that there be a transfer of all or substantially all of the predecessor corporation's assets. *Gall Landau Young Const.*, 63 Wn. App. at 97; *see also Hall,* 103 Wn.2d at 261. The undisputed facts show that none of these three required elements is present.

i. No Common Identity of Officers, Directors, and Stockholders

First, there is no common identity of the officers, directors, and stockholders. The stockholders of D.C., Inc. were Michael and Gerry Mullen. The sole stockholder of Columbia River Properties, Inc. is Mr. Fry. Mr. Fry was not a director of D.C., Inc. He was, and is, the sole director of CRP. While the Plaintiff makes much of the fact that Mr. Fry was appointed secretary of D.C., Inc. while he was an employee, successor liability cannot be imposed on the basis of someone being named an officer. The requisite facts necessary to sustain this first of three elements is that there be a common identity of the "officers, directors and stockholders." *See Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853,

866, 93 P.3d 108 (2004) (conjunctive tests require proof of all elements). There is only partial commonality in one of the three.

Appellant argues that Fry was a director of D.C., Inc. because he allegedly fits the dictionary definition of "director" because he managed, guided, or ordered the business. Br. of Appellant at 44-45. However, "director" is a term of art in the corporate sense. A director is elected by the shareholders to serve a specified term. RCW 23B.08.030; RCW 23B.08.040. There is no evidence, nor does Appellant claim, that any D.C., Inc. shareholder ever elected him to serve as a director.

Appellant failed to rebut the undisputed evidence that CRP and D.C., Inc. do not share common officers, directors, and stockholders.

ii. Adequate of Consideration Given

Second, there is no issue of material fact concerning the adequacy of consideration running to D.C., Inc. because CRP did not take any asset of D.C., Inc. except two filing cabinets. There was a de minimis transfer of assets between D.C., Inc. and CRP for which the Defendant paid full value. Appellant does not show otherwise. CRP also obtained a release of D.C., Inc.'s interest in its telephone number which D.C., Inc. was abandoning, at which point the number would have been available to any third party for no cost.

Despite Appellant's unsubstantiated assertion otherwise, CRP did not obtain D.C., Inc's goodwill because D.C., Inc. did not transfer any management contracts or listing agreements to CRP. And, importantly, Appellant has not established that the listing agreements and management contracts had any specific value.

The listing agreements and management contracts with D.C., Inc. expired or were terminated. 3 CP at 415-16, 418. CRP picked up some of those clients, but those clients signed with CRP because of Fry's marketing efforts, not because D.C., Inc. transferred the contracts to CRP. 3 CP at 418. In each case, the property owner was free to sign with any real estate broker that they chose. 3 CP at 415. Appellant offers no evidence to the contrary. Additionally, by regulation, all properties managed by a brokerage firm must be supported by a written management agreement signed by the owner and any amendment or modification to that agreement must also be signed by the owner. WAC 308-124D-215 (1) and (5).

Furthermore, to the extent that Appellant is arguing inadequate consideration, Appellant offered no evidence on what is adequate consideration. That is, Appellant has not demonstrated that even if CRP had obtained the listing agreements and management contracts from D.C., Inc., that the agreements and contracts had any value for which CRP

should have compensated D.C., Inc. Instead, Appellant relies on bald statements that CRP did not give adequate consideration. Appellant produced no evidence showing any issue of material fact on this issue and instead relies solely on statements of legal conclusions. *Layne*, 54 Wn. App. at 130 (non-moving party must present admissible facts and cannot rely upon legal conclusions to survive summary judgment).

Moreover, successor liability should not be imposed when the evidence reveals no asset of the predecessor corporation that could have been sold to satisfy a creditor's judgment. *Gall Landau Const.*, 63 Wn. App. at 98. In *Gall Landau*, there was negligible cash value to management contracts that could be terminated within 90 days. 63 Wn. App. at 98. The court reasoned that "[t]he purpose of the mere continuation theory is to render ineffective a transfer of the debtor corporation's assets when those assets could have been used to satisfy the corporation's debts." *Id.* Because the predecessor corporation's inability to meet its creditors' obligations did not stem from the transfer of the management contracts, "no equitable principle would be served in finding" successor liability. *Id.* at 99.

Similarly, the management contracts at issue here operated on a month-to-month basis and the owners could have terminated them at any time. 3 CP at 416. The contracts had no value to D.C., Inc.'s creditors

because the entities who owned the managed properties could have cancelled the contracts at any time and used another entity to manage their properties. There is no evidence that, but for the transfer of management contracts (or any other item for that matter), D.C., Inc. would have been able to pay its creditors. In fact, D.C., Inc. could not pay its creditors even when it held all of its management contracts. As Fry testified during his deposition, D.C., Inc.'s creditors called incessantly and D.C., Inc. had trouble meeting its payroll long before he left. 3 CP at 404. The property owners' independent decision to take their management contracts to CRP did not render D.C., Inc. unable to pay its creditors.

Appellant failed to rebut with evidene the undisputed fact that CRP paid adequate consideration for the sole asset it purchased from D.C., Inc.

iii. D.C., Inc. Did not Transfer Substantially All its Assets to CRP

The final element requires a transfer of all or substantially all of a predecessor corporation's assets. *Hall*, 103 Wn.2d at 261. Here, at most, D.C., Inc. transferred two used file cabinets for full value and abandoned a telephone number that had no value to any third party. While the inability to transfer listing agreements and management contracts was previously addressed, it is clear that Appellant gave no proof that D.C., Inc. transferred to CRP any of the other many categories of assets. Assets

which D.C., Inc. clearly did not transfer include: D.C., Inc.'s corporate name, bank accounts, accounts receivables, money held in escrow, furniture, fixtures, equipment, office supplies, office lease rights, web domain name,[1] goodwill, licenses, insurance policies and claims. Without a showing that substantially all of D.C., Inc.'s assets were transferred, the Plaintiff has failed to show that any of the three required elements of the "mere continuation" exception exist.

C. Appellant has Waived Arguments Regarding Implied or Express Assumption and Fraudulent Transfer.

Below, Appellant argued that the trial court should find that CRP expressly or impliedly assumed D.C., Inc.'s obligations or that CRP's efforts to build an independent business constituted a fraud on D.C., Inc.'s creditors. 3 CP at 484-85. However, Appellant has not assigned error to the trial court's ruling regarding these arguments, nor presented any facts, argument, or authority thereon. RAP 10.3(a)(4), (6); *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (without argument or authority to support it, an assignment of error is waived), *abrogated in part on other grounds by Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004); *Smith v. King*, 106 Wn.2d 443, 451–52, 722 P.2d 796 (1986) (reviewing court considers an assignment of error waived where it is not

[1] Contrary to Plaintiff's assertions, CRP did not take D.C., Inc.'s website. The two entities have completely separate web addresses. 3 CP at 431-37.

argued in the brief and no legal authority bearing on the issue is cited). If Appellant should attempt to raise these arguments in its reply brief, this court should reject such attempts. Arguments raised for the first time n a reply brief are too late to warrant consideration. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). Accordingly, this Court should find that Appellant has waived these arguments.

IV. CONCLUSION

The trial court's order granting Respondent's Motion for Summary Judgment should be affirmed. There are no genuine issues of material fact that CRP is not a mere continuation of D.C., Inc. and cannot be held responsible for D.C., Inc.'s liabilities.

DATED this 25th day of May, 2012.

EISENHOWER & CARLSON, PLLC

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CERTIFICATE OF SERVICE

ANGELA TRACY declares and states as follows:

1. I am a legal assistant at the law firm of Eisenhower & Carlson, PLLC, am over the age of 18, and otherwise competent to testify.

2. On the 25th day of May, 2012, I caused to be delivered via ABC Legal Messenger a true and correct copy of the foregoing document – Respondent's Brief – to the following:

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